STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY CARL JOHNSON, a/k/a HARRY JAMES JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 14, 2001

No. 225867
Kent Circuit Court
LC No. 98-012317-FH

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced to ten to thirty years' imprisonment for the cocaine conviction and to ten months' incarceration for the marijuana conviction. He appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion when it admitted a police officer's testimony into evidence regarding the contents of defendant's and Cory Colbert's booking records because this testimony was inadmissible hearsay. We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion occurs where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). Evidentiary rulings are further subject to a harmless-error analysis. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995), overruled on other grounds in *People v Kulpinski*, 243 Mich App 8, 19; 620 NW2d 537 (2000). Error is deemed harmless and will not warrant reversal when it does not affect a substantial right of a defendant and does not result in a miscarriage of justice. *Id*.; MRE 103(a); MCL 769.26.

Although the prosecutor never offered the booking information sheets into evidence as exhibits, defendant's hearsay objection was based on a police officer's testimony concerning the

contents of those records. MRE 805, the applicable rule of evidence concerning hearsay within hearsay, provides as follows:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Because the officer's testimony concerns the contents of an out-of-court statement that, in and of itself, might qualify as hearsay, our first inquiry is whether the booking sheets constitute inadmissible hearsay.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, a statement is not hearsay if it qualifies as an admission by a party opponent. MRE 801(d)(2).

Because we find defendant's booking information sheet is an admission by a party opponent under MRE 801(d)(2)(A), the trial court did not err when it admitted into evidence the officer's testimony concerning the contents of that information sheet. Trial testimony established that the booking information sheet contained defendant's own statements about his height, weight, and emergency contacts. According to the officer's testimony, the sheet contained information that established defendant was the nephew of Louis James, the man who rented the two motel rooms the police searched. Defendant's statement that Louis James is his uncle was offered against defendant because plaintiff used that information to establish defendant was related to the very man who originally rented the two motel rooms. Because the sheet is "a party's own statement" offered against that party and thus qualifies as an admission by a party opponent, the trial court did not abuse its discretion when it allowed the officer to testify regarding its contents.

Furthermore, defendant's and Colbert's booking information sheets qualify as records of regularly conducted activity under MRE 803(6). MRE 803(6) provides that the following is not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In *People v Harris*, 113 Mich App 333, 339-340; 317 NW2d 615 (1982), the trial court properly admitted prison records into evidence under MRE 803(6) where a prison records clerk

laid a proper foundation for the exhibit. Moreover, in *People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984), this Court stated the rule regarding the proper foundation for this exception as follows:

> For a proper foundation to be established for the admission of this document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

In the present case, the police officer testified that when a person is booked into jail, an intake officer writes down information on a booking sheet and as an officer, she has regular access to that information. Thus, the officer's testimony establishes that it is the regular practice of Kent County Jail to make these records and that such records are kept in the course of regularly conducted business activity. Because plaintiff established a proper foundation for the introduction of Colbert's booking information sheet under MRE 803(6), the trial court's decision to allow the officer to testify with regard to its contents was not an abuse of discretion.

Defendant also argues that the trial court erred when it allowed the officer to testify regarding the conversation she had with Cory Colbert the night before she testified at trial. At trial, the officer testified that she had spoken with Colbert the night before, and upon reviewing his booking records, she discovered it was impossible for Colbert to have paid cash for an extra night's stay in the room because he had been incarcerated in the Kent County Jail since September 11, 1998. She further testified that, as of the date of her trial testimony, Colbert had not been released. This testimony addressed other evidence that identification belonging to Colbert had been found in the motel room in which the drugs and defendant were found.

After defense counsel objected to the prosecutor's line of questioning, the parties agreed to make Cory Colbert a witness. However, Colbert was never called to testify at defendant's trial. Nevertheless, the officer's testimony that Colbert was incarcerated during the incident was based, at least in part, on her review of Colbert's booking records. Because those records fall within the business records exception to hearsay, and because plaintiff established the fact of Colbert's incarceration through a proper independent basis, the fact that defense counsel was denied an opportunity to cross-examine Colbert himself at trial was harmless error. Accordingly, we hold the trial court's evidentiary rulings do not mandate reversal.

II

Defendant next contends that the prosecutor engaged in misconduct when he waved papers purporting to be Colbert's booking records before the jury, even though the papers were never admitted into evidence, in order to make a point during closing arguments. He further contends that this misconduct deprived him of a fair trial. We disagree.

We review allegedly improper prosecutorial conduct to determine if defendant was denied a fair and impartial trial by virtue of that conduct. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, we believe the prosecutor's alleged misconduct did not deprive defendant of his right to a fair trial. Defendant correctly cites the rule that a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v*

Stanaway, 446 Mich 643, 686; 521 NW2d 557 (1994). However, an examination of the prosecutor's rebuttal argument reveals he did not make a statement of fact that was not supported by the evidence. On the contrary, at trial the officer testified that based on her review of Colbert's booking sheet, she concluded that Colbert was incarcerated from September 11, 1999, through the date of trial, and Colbert was never released at any point during this period. While the prosecutor never introduced Colbert's booking sheet itself as an exhibit at trial, he did present the officer's testimony at trial. Thus, the officer's testimony supports the prosecutor's statement in his rebuttal argument that there is no way Colbert could have been in the motel room where the police found the drugs.

Further, there is no indication that the prosecutor's act of waving papers purporting to be Colbert's booking records prejudiced defendant. The goal of a defense objection to prosecutorial remarks is a curative instruction. *Stanaway*, *supra*; *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). In giving the jury its instructions, the trial court carefully explained that the jury may not consider the lawyers' arguments and statements as evidence.

Because the trial court instructed the jury to only consider the sworn testimony and exhibits introduced at trial and to ignore the lawyers' statements and arguments, this instruction cured any negative impact the waving of those papers may have had on the jury before the jurors reached a verdict. See *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000) (holding that, absent an objection, a trial court's instruction that the attorneys' arguments are not evidence dispels prejudice).

Moreover, there is no indication in the record that the jurors were able to discern the contents of the papers the prosecutor waved in the air. Had the prosecutor actually handed the papers to the jurors for their review, this misconduct may warrant a different conclusion. However, we cannot conclude that simply waving papers in the air before the jury persuaded the jury to convict defendant of the charges brought against him. Thus, we hold defendant was not denied a fair trial.

III

Defendant also contends that he was denied his constitutional right to effective assistance of counsel when his trial counsel failed to object to the trial court's erroneous jury instruction that the jury could consider defendant's prior assault conviction only for the purpose of determining defendant's credibility at trial. Defendant further argues that his trial counsel was ineffective for failing to review trial transcripts containing a typographical error. Again, we disagree.

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, we must find that counsel's representation fell below an objective standard of reasonableness and the representation so prejudiced the defendant as to deny him a fair trial. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

MRE 609(a) prohibits the use of a criminal conviction for impeachment purposes unless that conviction contains an element of dishonesty, false statement, or theft. The crime of assault

with intent to commit great bodily harm, MCL 750.84, does not contain any of the above elements. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (holding that the assault with intent to commit great bodily harm less than murder requires proof of (1) attempt or threat with force or violence to do corporal harm to another (an assault), and (2) intent to do great bodily harm less than murder). Likewise, convictions involving no dishonesty or false statement are automatically not admissible to impeach a witness. *People v Allen*, 429 Mich 558, 596; 420 NW2d 499 (1988). Thus, we agree with defendant that the trial court erred in instructing the jury that defendant's assault conviction could be used to determine defendant's credibility at trial.

Nevertheless, plaintiff never used the assault conviction to impeach defendant's credibility during the course of trial. On the contrary, defendant himself introduced his assault conviction into evidence at trial for the purpose of restoring his credibility. As defendant explains in his appellate brief, his trial counsel introduced the conviction to explain why it was that defendant lied about his name to the police officer conducting his interview. Thus, defendant and not plaintiff introduced the conviction into evidence for the purpose of restoring rather than impeaching defendant's credibility.

Furthermore, defendant has failed to establish that trial counsel's failure to object to the trial court's improper jury instruction affected the outcome of trial. To establish the prejudice necessary to sustain a claim of ineffective assistance of counsel, there must have been a reasonable probability that, absent counsel's errors, the factfinder would have had a reasonable doubt regarding guilt, and the errors must have rendered the result of the proceeding fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702; 718; 555 NW2d 485 (1996).

While the improper jury instruction may have allowed the jury to consider defendant's conviction as evidence in determining defendant's truthfulness, it is clear that the intent of the trial court in giving this limiting instruction was to prevent the jury from concluding defendant's guilt on this case based on his prior assault conviction. Thus, we find that, because defendant has failed to establish how this instruction adversely affected the outcome of his trial, his argument that trial counsel's failure deprived him of effective assistance lacks merit.

Defendant also argues that he was deprived of his constitutional right to effective assistance of counsel when trial counsel failed to review the transcripts the jury requested during deliberations. According to defendant, had his counsel reviewed them, his counsel would have brought a typographical error in the transcripts to the jury's attention and cleared up any confusion concerning Tanesha Hines' testimony that defendant was wearing the same jumpsuit at trial as he was wearing on the day of his arrest.

Again, we find that defendant has failed to establish prejudice resulting from his trial counsel's error. The presence of an olive jumpsuit belonging to defendant inside the hotel room is of little significance. Trial testimony that defendant was arrested in the hotel room establishes defendant's presence in the room. Furthermore, the police officer conducting Hines' interview testified that when she interviewed Hines, Hines told the officer that Hines and defendant had been at the hotel room since the day before the raid. Thus, because other testimony establishes defendant's prolonged presence at the hotel, whether the jury believed that the police found an olive jumpsuit belonging to defendant is inconsequential.

Significantly, there was no testimony at trial that the police found any contraband in an olive jumpsuit. Because the mistaken belief that defendant wore the olive jumpsuit seized in the raid would not lead a jury to conclude that the drugs seized from the dresser, toilet tank, and black vest belonged to defendant, defendant has failed to establish how trial counsel's failure to review the discrepancy in the transcript affected the outcome of trial. Accordingly, we conclude that defendant has failed to satisfy the test necessary to prevail on an ineffective assistance claim.

IV

Defendant also argues that he was deprived of a fair trial because the prosecutor engaged in misconduct by threatening witness Hines in an attempt to persuade her to commit perjury at trial. Again, reviewing this prosecutorial misconduct claim to determine whether defendant was deprived of a fair trial, we disagree. *McElhaney*, *supra* at 283.

The alleged misconduct did not deprive defendant of his right to a fair trial. While defendant correctly states the rule that a prosecutor may not intimidate witnesses to keep them from testifying, *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992), Hines testified at trial that the prosecutor did not threaten or intimidate her. Moreover, while it is true that a prosecutor may not knowingly use false testimony to obtain a conviction, *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), there is no indication that Hines committed perjury at trial in order to secure defendant's conviction. On the contrary, Hines' trial testimony exculpates defendant. Hines testified that she never saw defendant wearing the black vest that contained the cocaine.

Given the fact that Hines' testimony actually benefited defendant and that Hines' testimony established that the prosecutor neither threatened nor intimidated her, it is unclear how the alleged prosecutorial misconduct deprived defendant of a fair trial. Furthermore, while defendant contends that Hines' emotional state after her conversation with the prosecutor shows that the prosecutor must have engaged in some kind of misconduct during that conversation, there is no evidence on the record of any wrongdoing. Accordingly, we hold that defendant was not deprived of a fair trial.

V

Defendant also argues that the sentencing court erred when it failed to grant him credit for jail time already served. However, defendant fails to provide us with a sufficient basis to review the issue.

Defendant correctly cites the rule that a defendant on parole who receives a consecutive sentence is not entitled to credit against the subsequent sentence for time served, because that credit is applied to the first sentence. *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991). Defendant nevertheless maintains that he "had served the minimum portion of the previous sentence" and that "the minimum sentence has expired." Because defendant fails to provide us with information regarding the length of his previous sentence, when it began or ended, and whether his previous sentence was extended as a result of his parole violation, defendant does not provide sufficient information for us to review the issue. Thus, review is precluded.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski